LIM SIN OO & ORS.

v.

CHEAH TJENG SIONG

HIGH COURT MALAYA, PULAU PINANG
WAN ADNAN J
[CIVIL APPEAL 23-234-87]
26 JANUARY 1989

CONTRACT: *Claim of specific performance pursuant to O. 81 of Rules of the High Court - Section 19 of the Specific Relief Act 1980 - Rescission of Contract - Does further negotiations negate any intention to rescind contract - Breach of contract - Whether agreement is breached by a party unilaterally extending the completion date.*

By an agreement dated 15 November 1984 the plaintiffs had agreed to sell to the defendant the land known as Holding No. 329, TS 15 North East District for the purchase price of RM999,000. Pursuant to Clause 2 of the agreement, the defendant paid to the plaintiffs a deposit of RM99,900. The balance of the purchase price was to be paid in accordance with Clause 4 of the agreement in the following manner:

(a) the sum of RM199,800 being 20% of the purchase price must be paid within six months from the date of the agreement (that is by 15 May 1985);

(b) the final sum of RM699,300 being 70% of the purchase price must be paid within nine months from date of agreement (that is by 15 August 1985)

By 20 November 1985 the defendant had paid a further sum of RM300,000 making the total payment of RM399,900. The defendant had failed to pay the balance of RM599,100. The defendant stated in his defence that he had paid the total of RM417,900. But at the hearing his Counsel had agreed to accept the plaintiffs' figure for the purpose of the application.

Whether the agreement has been rescinded on 22 August 1986 the plaintiffs sent a notice to the defendant demanding payment of RM599,100 within one month. The notice also stated "failing which my clients will take steps to rescind the agreement and forfeit the deposits. On 27 February 1987 another notice was sent to the defendant demanding the said sum of RM599,100 within 6 weeks. The notice also included the wards "failing which our client's instructions are to rescind the agreement and to forfeit the deposit and".

The plaintiffs said that after the issue of the notice dated 27 February 1987 there were negotiations wherein the defendant evinced an intention to complete the sale at a lower price. However negotiations broke down. Then on 19 May 1987 the plaintiffs' solicitors wrote another notice demanding the sum of RM599,100 "within 2 weeks otherwise we have strict instructions to proceed with legal action"

The defendant contended that the agreement had been rescinded and therefore the plaintiffs are only entitled to remedy under Clause 7 of the agreement which is damages.

By a summons in chambers dated 26 November 1987 the plaintiff had applied for an order of specific performance pursuant to O. 81 of the Rules of the High Court and for the defendant's defence and counter-claim to be struck out.

By a summons-in-chambers dated 19 February 1988 the defendant had applied for the order that the statement of claim, reply and defence to counter-claim be struck out (this was abandoned during the hearing) and that judgment in terms of the defendant's counter-claim for the sum of RM417,900 to be entered against the plaintiff.

The Court allowed the application of the plaintiff and granted the order for specific performance in terms of the minutes of the judgment filed and dismissed the counter-claim. Against the order the defendant has now appealed.

Held:

By sending a second notice of rescission upon the failure of the negotiations subsequent to the 1st notice of rescission, the parties negated any intention to abandon the contract and therefore there was no rescission of the agreement. The plaintiffs are entitled to specific performance of the agreement. No breach of the agreement by the plaintiff extending the completion date to 5 September 1985 as the defendant had consented to the extension.

Legislation referred to:

Specific Relief Act 1950, s. 11(1)
Rules of the High Court 1980, O. 81
Control of Rent Act 1966, s. 23(2)

For the plaintiffs - Karen Lim Ai Ching; M/s. Presgrave & Matthews
For the defendant - Ng Choo Hock; M/s. Cheong Wai Meng & Van Buerle

JUDGMENT

Wan Adnan J:

In this action the plaintiffs claimed for specific performance of the written agreement made between the plaintiffs and the defendant on 15 November 1984 for the payment of the balance of the purchase price of the land known as Holding No. 329 TS 15 North East District together with the premises thereon (the said property) amounting to RM599,100 and other reliefs. The defendant had counterclaimed against the plaintiffs for the sum of RM417,900.

By the summons-in-chambers dated 26 November 1987 (encl. 8) the plaintiffs had applied for the order of specific performance pursuant to O. 81 of the Rules of the High Court and for the defendant's defence and counterclaim to be struck out. By the summons-in-chambers dated 19 February 1988 (encl. 10) the defendant had applied for the order that the statement of claim, reply and defence to counterclaim be struck out (this was abandoned during the hearing) and the judgment in terms of the defendant's counterclaim to be entered against the plaintiffs.

The two applications were heard together. After hearing the parties in open Court I allowed the application of the plaintiffs and granted the order of specific performance in terms of the minutes of the judgment filed and I dismissed the counterclaim. The defendant's applications was therefore dismissed.

Against this order the defendant now appeals.

According to the plaintiffs by the agreement dated 15 November 1984 made between them and the defendant (the agreement) they had agreed to sell to the defendant the said property for the purchase price of RM999,000. Pursuant to Clause 2 of the agreement, the defendant paid the plaintiffs a deposit of RM99,900. The balance of the purchase price was to be paid in accordance with Clause 4 of the agreement in the following manner:

(a) the sum of RM199,800 being 20% of the purchase price must be paid within six months from the date of the agreement (that is by 15 May 1985);

(b) the final sum of RM699,300 being 70% of the purchase price must be paid within nine months from date of agreement (that is by 15 August 1985).

By 20 November 1985 the defendant had paid a further sum of RM300,000 making the total payment of RM399,900. The defendant had failed to pay the balance of RM599,100. The defendant stated in his defence that he had paid the total of RM417,900. But at the hearing his Counsel had agreed to accept the plaintiffs' figure for the purpose of the application.

Clause 7 of the agreement states as follows:

> If the purchaser fails to pay the balance purchase price under clause 4 above within the time stipulated the vendors may at any time thereafter at their absolute discretion forthwith determine the agreement and rescind the contract which shall become effective from the date of the vendors giving notice in writing in this behalf to the purchaser and to resell the said property to other persons on the happening of which event the vendors shall be entitled to forfeit the deposit of RM99,900 paid under clause 4 hereof as liquidated damages for breach of contract and not by way of penalty.

Clause 13 states as follows:

> The purchaser shall be entitled to specific performance of this agreement and also to file private caveats against the said property upon the execution of the agreement.

A. Whether the agreement has been rescinded

On 22 August 1986 the plaintiffs sent a notice (Exhibit L8 in encl. (7)) to the defendant demanding payment of RM599,100 within one month. The notice also stated "failing which my clients will take steps to rescind the agreement and forfeit the deposits." On 27 February 1987 another notice (Ex. L9 in encl. (7)) was sent to the defendant demanding the said sum of RM599,100 within 6 weeks. The notice also included the words "failing which our client's instructions are to rescind the agreement and to forfeit the deposit and ..."

The plaintiffs said that after the issue of the notice dated 27 February 1987 there were negotiations wherein the defendant evinced an intention to complete the sale at a lower price. However negotiations broke down. Then on 19 May 1987 the plaintiffs' solicitors wrote another notice (Ex. L7 in encl. (14)) demanding the sum of RM599,100 'within 2 weeks otherwise we have strict instructions to proceed with legal action".

The defendant contends that the agreement had been rescinded and therefore the plaintiffs are only entitled to the remedy under Clause 7 of the agreement.

An agreement is rescinded only when there is a total abandonment of the whole contract. The parties had continued to negotiate after the issue of the notice and upon the failure of the negotiations the plaintiffs issued another notice. The conduct clearly negatived any intention to abandon the contract. I therefore held that there was no rescission of the agreement.

B. Whether the plaintiffs can claim for specific performance in view of the provision of Clause 7 and 13 of the agreement.

The defendant contends that Clause 7 of the agreement provides the only remedy available to the plaintiffs in event of breach. It is further contended that by virtue of Clause 13 of the agreement only the purchaser (defendant) was entitled to the relief of specific performance.

Clause 13 must not be construed to include something it does not provide. It does not state that the vendor (plaintiffs) are disentitled to the relief of specific performance.

Section 19 of the Specific Relief Act 1950 states:

> A contract, otherwise proper to be specifically enforced, may be enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Clearly therefore the stipulation in Clause 7 of a sum of money to be paid as damages in case of breach by the purchaser (defendant) is not a bar to a claim for specific performance by the plaintiffs. Further the clause says "at their absolute discretion ..." This shows that under the provisions of clause 7 the plaintiffs (vendor) had the choice of either determining the agreement and forfeiting the deposit of RM99,900 or claiming for specific performance.

I therefore held that the plaintiffs were entitled to claim for specific performance of the agreement.

C. Whether the plaintiffs had breached the agreement by unilaterally extending the completion date to 5 September 1985

The defendant contends that the plaintiffs by their solicitors' letters dated 31 July 1985 (Ex. CTS2 in encl. 13) and 6 September 1985 (Ex. CTS3 in encl. 13) had breached the agreement by unilaterally extending the completion date and thereby evinced an intention no longer to be bound by the agreement.

The plaintiffs contend that the extension was mutually agreed first to 5 September 1985 and then to 4 May 1986.

There is evidence that the plaintiffs and the defendant had direct contact with each other and made certain arrangements between themselves. The letter from defendant's solicitors to the plaintiffs former solicitors (Ex. L2 encl. 7) is one of them. In the letter it was stated "... informing you that your clients have agreed to allow our client to pay the balance of RM99,800 as soon as ..." Another is the letter dated 20 November 1985 from the defendant solicitors to the plaintiffs' solicitors (Ex. L7 encl. 7). It was stated in the letter "... that your clients have agreed with our clients to extend the date of payment ..." The defendant himself had stated in his affidavit (encl. 13) that he had had discussions with the plaintiff (see para. 11 and 13 of the affidavit) . There is no evidence that the defendant had at any time objected to the extension on 6 September 1985 the plaintiffs solicitors wrote to the defendant's solicitors (Ex. L4 encl. 7). The new date of completion was stated. Again the date was mentioned in the letter dated 8 October 1985 (Ex. L6 - encl. 7).

I find that it was very probable and I believe that the defendant had consented to the extension of the completion date to 5 September 1985.

D. Whether specific performance should be granted

The plaintiffs says that this is a proper case for the Court to exercise its discretion to grant specific performance of the agreement because the pecuniary compensation for its non-performance does not afford adequate relief.

Section 11(1) of the Specific Relief Act 1950 states:

> Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced:
>
> (a)-...-
>
> (b)-...-
>
> (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

The plaintiffs say that in contemplation of the execution of the agreement they took steps to terminate three (3) existing tenancies together with the termination of the management of the business at the premises by adequately compensating the tenants. There was the agreement dated 17 September 1984 (Ex. L10 encl. 7) terminating a tenancy with effect from 31 May 1985. The tenant was paid RM8,000 as compensation. There was the agreement with another tenant (Ex. L11 encl. 7). The tenant was paid RM10,000 as compensation for agreeing to quit on 31 May 1985. There was another agreement dated 17 September 1984 (Ex. L12 encl. 7) with one Toh Hock Chuan who managed the business of Happy Hotel & Bar at the premises. He was paid RM65,000 as compensation for agreeing to quit and vacate before 30 June 1985. The plaintiffs say that as a result of the termination of the business of Happy Hotel & Bar they have suffered have loss suffered and damage. No business could be carried at the premises thereafter when the defendant failed to complete the agreement.

The defendant on his part had applied for and obtained from the Rent Tribunal Board the certificate of de-control of the premises under s. 23(2) of the Control of Rent Act 1966 (Ex. L6 encl. 114). The certificate stated that the premises was vacated on 3 September 1985 and "the premises No. 116 Burmah Road Penang shall forthwith cease to be controlled under s. 23(2) of the Control of the Rent Act 1966". The certificate was dated 23 November 1985.

Under the agreement the defendant had agreed to purchase the land in question at the price of RM999,000. But later as evidenced in the letter dated 19 May 1987 (Ex. L7 encl. 14) the defendant had requested for the purchase price to be reduced to RM600,000. He did not want to pay the price he had earlier agreed to.

I believe that the agreements terminating the tenancies and the management agreement dated 17 September 1984 were all executed by the plaintiffs in contemplation of the execution of the agreement. The plaintiffs had suffered loss and damage. The Hotel & Bar business was closed. I also believe that the defendant had applied and obtained the certificate under the Rent Control Act 1986 and I accept as true the statement in the certificate that the premises had been vacated on 3 September 1985 and was vacant at the time the certificate was granted. The plaintiffs were able to deliver vacant possession at the new completion date - 4 May 1986.

I find that in the circumstances of the case damages would not be adequate remedy to the plaintiffs. I find that the defendant had not raised any triable issue in the action. I therefore gave judgment with costs to the plaintiffs in terms of the minutes of the judgment filed namely:

That the agreement dated 10 November 1984 made between the plaintiffs of the one part and the defendant of the other part mentioned in the writ of summons be specifically enforced and carried into execution.

And the defendant do pay the plaintiffs the balance of the purchase price amounting to RM599,100 when the plaintiffs will then execute a conveyance of the property known as Holding No. 329, TS 15 North East District, Penang with premises No. 116 Burmah Road, Penang thereon on the defendant.

And the plaintiffs thereafter will give the defendant vacant possession of the said property.

Consequently I dismissed the defendant's application with costs.

Also found at [1989] 1 CLJ 953